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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-5414

ILYA WOLSTON,

Petitioner,

v.

THE READER'S DIGEST ASSOCIATION, INC., d/b/a READER'S DIGEST PRESS; BANTAM BOOKS, INC.; BOOK-OF-THE-MONTH CLUB, INC.; MACMILLAN BOOK CLUBS, INC.; JOHN BARRON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I.

A. To give "breathing space" to protected speech, this Court has accorded substantial constitutional protection to defamatory falsehood in all cases, thus ensuring that the media will not be insurers of the truth of that which they communicate. The only consequence of a determination that petitioner is not a "public figure" for purposes of this defamation action would be that he may receive actual damages without showing that respondents' defamatory falsehoods were uttered knowingly or in reckless disregard of their untruth. For this Court has totally rejected liability without fault in defamation cases and permits punitive damages only on a showing of "actual malice" as that term is defined in New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964). (Gertz v. Robert Welch, Inc., 418 U.S. 323, 347, 349-350 (1974)).[1/] Respondents' assertion that reversal of the judgment below would adversely affect the exercise of First Amendment rights totally ignores these significant constitutional safeguards which they will enjoy whatever the outcome on the "public figure" issue. And respondents also ignore -- as if it were a light thing for a person to be accused of being a Soviet agent -- the petitioner's interest in his own reputation, and the societal interest in protecting it. Gertz makes clear that the extent of the protection which freedom of the press is to be given requires accommodation of "[t]he legitimate state interest * * * [in] compensation of individuals for the harm inflicted on them by defamatory falsehood" which injures "'private personality.'" Id. at 341. Respondents do not acknowledge that countervailing interest, nor do they recognize the limited intrusion on their interest in publishing which reversal would entail. They thus fail to do business with the actual issue before the Court.

B. We agree with respondents that "where an individual engages in criminal activity, he inevitably breaches his own privacy * * *" (Resp. Br. 24).[2/] However, while the public's

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1/ Contrast the present constitutional doctrine with the Alabama common law which was described id. at 267 and the Louisiana Criminal Defamation Statute struck down in Garrison v. State of Louisiana, 379 U.S. 64, described id. at 65 n.1, 78-79 (1964).

2/ Respondents' Brief will be cited as "Resp. Br." Petitioner's Brief will be cited as "Pet. Br."

justifiable interest in these matters may cause a person to lose his right of privacy with respect to reporting of the defendant's conduct, the state's accusation and its disposition, see Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975), he does not thereby become a public figure for libel purposes whose interest in protection from defamatory falsehood is diminished. Respondents' contrary argument proceeds from the unexpressed and erroneous premise that a public figure for purposes of privacy law is a public figure for purposes of defamation law.[3/] As this Court has recognized, however,

> "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has, and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316, 328 (1961), quoting Cook, The Logical and Legal Bases of the Conflict of Laws at 159.

The interests protected by privacy and defamation law are different. Privacy law protects the right to be free from unwanted exposure to public view. Defamation law protects the right to be free from public exposure by false matter.

Adoption of a rule that a person who becomes involved in the criminal process[4/] and hence loses his right of privacy, is also thereby subject to the actual malice standard for defamation

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3/ Restatement of Torts (Second), § 652D, Comment f, relied upon by respondents, addresses who is a public figure for purposes of an action for invasion of privacy, not defamation.

4/ Respondents would categorize even persons who are only accused of crimes as public figures for libel purposes without regard to whether they are indicted and tried, and if tried, whether they are acquitted or convicted (Resp. Br. 28).

purposes ignores the state's interest in protecting such a person's reputation from defamatory falsehood. Such a person is not only particularly vulnerable to defamatory falsehood, he has no "access to the channels of effective communication and hence [no] * * * realistic opportunity to counteract false statements * * *." Gertz, 418 U.S. at 344. Even if convicted, he should not then be deemed to be a public figure, for the sanctions imposed by the state should be deemed sufficient; there is no room for the additional sanction that he thereby becomes fairer game for libel than the ordinary citizen. Otherwise the state's interest in rehabilitation would also be undermined.[5/]

Equation of the circumstances which cause loss of the right of privacy with the circumstances which make one a public figure for libel purposes is also inconsistent with this Court's opinion in Gertz. Involvement in that which is of general public interest may cause loss of privacy, but it cannot also result in diminution of one's right not to be defamed unless this Court adopts the plurality view in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971),[6/] which Gertz expressly rejected.

5/ A convicted criminal's interest in being free from unwanted publicity which causes him embarrassment and the state's interest in his rehabilitation may be outweighed by the public's interest in information about matters of general concern where the communication is accurate. See Cox, supra. The same cannot be said where defamatory falsehood is involved. See Gertz, 418 U.S. at 340.

6/ Rosenbloom itself shows the distinction between the loss of a right of privacy and the loss of the right to be treated as a private person for purposes of defamation. Rosenbloom, a distributor of nudist magazines who was arrested and prosecuted on obscenity charges, did not seek publicity or consent to it. As the District Court recognized, he "was isolated from public view until others had thrust him into it." Rosenbloom v. Metromedia, Inc., 289 F. Supp. 737, 742 (E.D. Pa. 1968). It was the action of the government which drew attention to him. Accordingly, (footnote continued)

Ilya Wolston's failure to respond to the grand jury subpoena, accordingly, without doubt resulted in loss of his right of privacy with respect to the reporting of that event and his criminal prosecution, but it did not make him a public figure for libel purposes. 7/ Nor does his criminal conviction for failing to obey the subpoena mean that the state's interest in protecting his reputation with respect to accusation of the crime of espionage is diminished, especially where, as here, he has no realistic opportunity to counteract the libel, and the crime which KGB says he committed is particularly heinous. 8/

(footnote continued) although he may have lost his right to privacy with respect to the government's charges, see Cox, supra, the District Court held that he was a private person for libel purposes. This Court accepted this characterization of him both in the plurality opinion and in the dissents, despite the fact that a finding that he was a public figure under Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967) would have avoided decision on a constitutional issue which fragmented the Court.

7/ Nor did subsequent defamatory falsehoods, such as those which appeared in the Morros book and FBI report, change his status. As the District Court recognized,

> In assessing Wolston's "notoriety," this court limits itself to consideration of his contempt conviction and subsequent coverage of that conviction. For if, as Wolston contends, allegations that he was a Soviet agent are libelous, then any notoriety springing from those allegations has no bearing on the issue here. The Supreme Court's decisions require purposeful activity on plaintiff's part; thus libel alone -- particularly the very libel on which a lawsuit is based -- cannot rob a person of his status as a private individual. (App. 103 (District Court Opinion)).

The Court of Appeals similarly restricted itself to consideration of Wolston's failure to appear, contempt conviction and contemporaneous news coverage. (See App. at 121-123).

8/ Respondents attribute to petitioner the proposition that a person who was once a public figure will lose that status over time (Resp. Br. 33-34). We have not urged the proposition here. Rather, we believe that under application of any fault standard, the length of time between the event and the publication is a (footnote continued)

II.

A. We fully agree with respondents that the New York Times "actual malice" test "focuses on the publisher's state of mind * * *" (Resp. Br. 35-36). And that is one of two reasons why Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) establishes that the courts below erred in allowing summary judgment. (See the second sentence of the quotation from Poller (id. at 473) at Pet. Br. 23 and our comment at the top of Pet. Br. 24).

The second reason that Poller is decisive against respondents is its holding that it is "only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." (368 U.S. at 473, third sentence quoted at Pet. Br. 23). That acceptance of Barron's credibility was critical to the resolution of the "actual malice" issue is underscored by respondents' pervasive reliance on what Barron "testified under oath" (Resp. Br. 37, 43. See also Resp. Br. 38-39, 41, 42 referring to various assertions in Barron's deposition and affidavit). Despite respondents' repeated suggestions that it was incumbent on petitioner to adduce evidence which would impeach Barron (Resp. Br. 37, 41, 42), Poller placed no such burden on the party which opposes summary judgment. And St. Amant v. Thompson, 390 U.S. 727 (1968), heavily relied on by respondents (Resp. Br. 36, 40, 43, 45), held:

(footnote continued) matter to be considered by the trier of fact in determining whether there was fault because it bears on the opportunity afforded for investigation. Obviously, such considerations would allow for differences in result between media reporting of "hot news" and the process of writing what purport to be reflective works of history.

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. (390 U.S. at 732). 9/

A fortiori the defendant cannot thereby automatically avoid a trial on motion for summary judgment.

To grant such a motion where a material issue turns on a credibility determination is wrong for two reasons: first, it deprives the trier of fact -- whoever it may be -- of the advantage of observing the demeanor of witnesses whose credibility is at issue; and second, it deprives the plaintiff of his Seventh Amendment right to have any fairly disputable material issue of fact resolved by a jury rather than a judge. 10/

B. It is enough to require reversal that the decision below conflicts with the summary judgment precedents in this Court (Pet. Br. 23-24), which able and resourceful counsel for respondents fail even to mention. We shall therefore respond only briefly to their strained denial that the District of Columbia Circuit has developed a special summary judgment rule for

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9/ In the passage from St. Amant quoted at Resp. Br. 36, this Court reiterated the substantive standard of liability under New York Times, and the opinion elsewhere places the burden of proving "actual malice" on the plaintiff (390 U.S. at 730); but this does not affect the propriety of summary judgment. In Poller itself it was, of course, the plaintiff (there as here the party which opposed summary judgment) that had the burden of proof with respect to the existence of a conspiracy in restraint of trade.

10/ Of course, the foregoing does not mean that summary judgment will never be available to defendants in defamation cases. Most issues in a defamation suit involve no mental element, and in many, the motion will not depend on accepting the credibility of a defense witness. For example, it can ordinarily be determined as a matter of law whether a defamatory statement is an assertion of fact, or is immune because it is an expression of opinion or rhetorical hyperbole. See Greenbelt Cooperative Publishing Ass'n. v. Bresler, 398 U.S. 6, 14 (1970).

New York Times "malice" cases. It suffices to point out that the District Judges in the District of Columbia believe that there is a special rule; indeed, the District Court began its discussion of the application of the constitutional standard with the observation that "[t]he court of appeals for this jurisdiction has observed that summary procedures are especially appropriate in the First Amendment area" (App. 113), citing Washington Post Company v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967). 11/ In any event, respondents do not disagree that "the traditional summary judgment standard [was] applied by the Ninth Circuit in Guam Federation of Teachers, Local 1581, AFT v. Ysrael, 424 F.2d 438, cert. denied, 419 U.S. 872 (1974)" (Resp. Br. 44). Respondents appear to be satisfied with that standard, and so are we.

CONCLUSION

For the foregoing reasons, and those stated in the Brief for Petitioner, the judgment of the court below should be reversed and the case remanded for a trial on the merits.

11/ See also Martin Marietta Corp. v. The Evening Star Newspaper Co., 417 F. Supp. 947, 954 (D.D.C. 1976, Flannery, J.); Hoffman v. The Washington Post Co., 433 F. Supp. 600, 604-605 (D.D.C. 1977, Pratt, J.), aff'd without opinion, 578 F.2d 442 (D.C.Cir. 1978). Since respondents make much of the fact that Judge Wright's opinion in Wasserman v. Time, Inc., 424 F.2d 920 (D.C.Cir.), cert. denied, 398 U.S. 940 (1970)(discussion in Pet. Br. at 25-29) was only a concurring opinion (Resp. Br. 44-45), we note that it represented the views of the majority of the panel, since it was joined by a second judge, and that it was regarded as stating the rule of the District of Columbia Circuit by both the Fifth and the Ninth Circuits in the cases cited at Pet. Br. 26, text and note 7. And since that opinion was written by the author of Washington Post v. Keogh and cites that decision as authority for the proposition stated, it reflects what the Keogh opinion means, or at the very least represents an authoritative gloss thereon.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date two copies of the foregoing Reply Brief for Petitioner were served by hand upon John J. Buckley, Jr., Williams & Connolly, 839 - 17th Street, N.W., Washington, D.C. 20006, counsel of record for respondents.

Dated: April 10, 1979

George Kaufmann

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